



Order under Section 77(8) Residential Tenancies Act, 2006

Citation: Dibattista v Small, 2023 ONLTB 30972

Date: 2023-04-12

File Number: LTB-L-002686-23-SA

In the matter of: Basement, 12 ARJAY TRAIL BRAMPTON
ON L6X4L9

Between: Umberto Dibattista Landlord

And

Gerald Small Tenant

Umberto Dibattista (the 'Landlord') applied for an order to terminate the tenancy and evict Gerald Small (the 'Tenant') because the Tenant failed to meet a condition specified in an order issued by the Board on August 31, 2022 with respect to application LTB-L-001229-22.

The Landlord's application was resolved by order LTB-L-002686-23, issued on March 6, 2023. This order was issued without a hearing being held.

The Tenant filed a motion to set aside order LTB-L-002686-23.

The motion was heard by videoconference on March 23, 2023. The Landlord's legal representative, T. Landrault, the Landlord, the Tenant, and the Tenant's legal representative, L. Webley, attended the hearing. The Landlord also had the following witnesses testify at the hearing:

- M. Caloiero (MC)
- A. Baglione (AB)
- S. Arvanities (SA)

Determinations:

1. Order LTB-L-001229-22 issued on August 31, 2022 provides that the Landlord can apply to the LTB under section 78 of the *Residential Tenancies Act, 2006* (the 'Act') without notice to the Tenant to terminate the tenancy and evict the Tenant if the Tenant does not meet certain condition(s) in the order. This application was filed within 30 days of the breach.
2. The Landlord alleges that the Tenant has not met the following condition specified in the order:

On November 5, 2022 at 6:39 pm and November 25, 2022 at 8:18 pm, the Tenant and/or the Tenant's guests and/ or occupants failed to refrain from smoking in the rental unit.

3. The Landlord's daughter, AB, and her partner, MC, reside in the upstairs portion of the rental unit. The Tenant occupies the basement unit with a roommate.
4. The Tenant disputed having breached order LTB-L-001229-22. He testified that he does not recall the dates in question, but he does not smoke inside the unit. He smokes several times a day. He smokes inside his car when there is inclement weather and when the weather is nice, he smokes in front of the house. The Landlord submitted into evidence photographs from November 5 and November 25, 2022. The photograph from November 5, 2022 showed an ashtray on a computer desk in the Tenant's unit. The photograph from November 25, 2022 showed the same ashtray with brown items in it. The Tenant stated that he only places tea bags in the ashtray.
5. AB testified that on November 5, 2022, she was in her bedroom and smelled cigarette smoke coming from the vent. She also smelled cigarette smoke on November 25, 2022 coming from the vent. AB went to the rental unit on these dates and took photos through the window. AB kept a log of when she smelled the smoke. MC testified to same. They stated that while they both smoke, they never smoke in the house. MC also testified that he has only ever seen the Tenant smoke outside once or twice.
6. I am satisfied that the Tenant breached the conditions by smoking in the unit on November 5, 2022 and November 25, 2022. I make this conclusion based on AB and MC's consistent testimony that the smell of smoke was coming from inside the house, they were not smoking inside and there is no one else in the house that smokes except for the Tenant. MC's testimony that he has only observed the Tenant smoke outside once or twice is persuasive that the Tenant smokes inside as the Tenant's testimony is that he smokes several times a day. I also prefer the Landlord's evidence to the Tenant's as the Tenant could not recall the dates in question. While I do not find that the contents of the ashtray were cigarettes or ash, the foregoing evidence supports my finding of fact that the Tenant breached.
7. I also heard testimony from AB and MC regarding events after November 25, 2022 regarding the Tenant's smoking. AB testified that she smelled smoke emanating from the Tenant's unit on January 17, February 8, February 26, March 3, March 4, March 11 and the date of the hearing. MC testified to having smelled the smoke on January 17, February 26 and March 4.
8. The Landlord's witness, SA, is AB's sister. She stated that she attended her sister's home on February 26, 2023 for a birthday party. When she entered, she smelled an overwhelming smell of smoke close to the stairs leading to the Tenant's unit. She stated her 5-year-old son also commented on the smell.
9. The Landlord also had R. Goriah, S. Ramlal and T. Dibittista present to testify at the hearing. I did not hear from the witnesses pursuant to section 15 of the *Statutory Powers Procedure Act, 1990* as the evidence would be unduly repetitious.
10. After considering all of the circumstances, I find that it would be unfair to set aside order LTB-L-002686-23. I am satisfied that the Tenant smoked inside the rental unit on several other occasions. Further, AB and MC testified that they are disturbed by the smell as they get headaches and feel embarrassed when visitors come over.

11. However, I find it would not be unfair to postpone lifting the stay. The Tenant is elderly and has resided in the unit for 4.5 years. The Tenant should be afforded some time to organize his move.

It is ordered that:

1. The motion to set aside Order LTB-L-002686-23, issued on March 6, 2023, is denied.
2. The stay of Order LTB-L-002686-23 is lifted on May 31, 2023.
3. Order LTB-L-002686-23 is unchanged.

April 12, 2023
Date Issued

Camille Tancioco
Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.